

THE GREAT WRIT AND FEDERAL COURTS:  
JUDGE WOOD'S SOLUTION IN SEARCH  
OF A PROBLEM

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INTRODUCTION

Judge Diane Wood provides, in her characteristically efficient prose, a thoughtful overview of the history of the Great Writ in service of a thesis that her essay otherwise fails to support. Judge Wood invokes Judge Henry Friendly's classic article, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*,<sup>1</sup> to suggest that the writ of habeas corpus should be expanded to allow federal courts to review the petitions of state prisoners who allege their actual innocence without otherwise identifying any violation of federal law in securing their convictions.<sup>2</sup> But that thesis cannot be squared with the proposal Judge Friendly championed in his article. Nor is it consistent with the limited jurisdiction of the federal courts. And Judge Wood's essay fails to make the case for how her proposed expansion of the writ would work or whether it would even likely result in the grant of relief to a substantial number of prisoners whose innocence would otherwise go undetected. If anything, Judge Friendly's case for *restricting* the writ remains compelling though unfulfilled.

I

Judge Wood advocates an expansion of the writ of habeas corpus to allow federal courts to review the petitions of state prisoners who allege their actual innocence without otherwise identifying any violation of federal law in securing their convictions. She argues that a claim of innocence "should

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\* Circuit Judge, United States Court of Appeals for the Eleventh Circuit. I thank three of my law clerks, Elizabeth Kiernan, John Brinkerhoff, and Alex Carver, for their quick research and writing assistance. All errors are mine.

1 Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

2 Diane P. Wood, *The Enduring Challenges for Habeas Corpus*, 95 NOTRE DAME L. REV. 1809 (2020).

stand at the top of the hierarchy of reasons for granting relief,” “well above” a claim that the state violated one of the procedural rights guaranteed to criminal defendants in the Bill of Rights.<sup>3</sup> A “sensible treatment” of the issue, she maintains, would involve opening the door to a freestanding claim of innocence, but only if the prisoner satisfied “[a] clear and demanding threshold standard.”<sup>4</sup> In her view, “[t]he rule of law itself demands no less.”<sup>5</sup>

To make her case for expanding the Great Writ to allow freestanding claims of innocence, Judge Wood relies on an unlikely authority: Judge Friendly’s classic article advocating a significant *restriction* of the writ.<sup>6</sup> A half-century ago, motivated by the “explosion of collateral attack” in federal courts, Judge Friendly endeavored to chart “the right road for the future.”<sup>7</sup> That road involved eliminating collateral review for many claims of constitutional error by convicted prisoners, save for those claims involving a total breakdown of the criminal process, errors outside the record that cannot be corrected on appeal, procedures that forbid defendants to raise constitutional claims at trial, and retroactive constitutional rules of criminal procedure.<sup>8</sup> Outside of those narrow circumstances, Judge Friendly proposed a new prerequisite for a prisoner’s federal petition: proof that the prisoner is innocent of his crime of conviction. As he put it, “convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence.”<sup>9</sup>

Judge Friendly argued that endlessly revisiting criminal convictions has many negative consequences and for that reason “carries a serious burden of justification.”<sup>10</sup> It undermines the educational and deterrent functions of the criminal law, poses great difficulties in accurately determining the facts long after the commission of the crime, and imposes a tremendous drain on public resources for vanishingly small rates of error correction.<sup>11</sup> The ease with which prisoners may challenge their convictions also means that “the occasional meritorious application” is destined “to be buried in a flood of worthless ones.”<sup>12</sup> And society has an interest in the finality and repose that come with an end to litigating the validity of a criminal judgment.<sup>13</sup> In the light of those costs, Judge Friendly proposed requiring habeas petitioners to supplement their claims of constitutional error with proof of innocence, which “would enable courts . . . to screen out rather rapidly a great multitude

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3 *Id.* at 1832.

4 *Id.*

5 *Id.* at 1834.

6 *Id.* at 1809–10.

7 Friendly, *supra* note 1, at 144, 146.

8 *Id.* at 151–54.

9 *Id.* at 142.

10 *Id.* at 146.

11 *Id.* at 146–49.

12 *Id.* at 149 (quoting *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in the result)).

13 *Id.*

of applications not deserving their attention and devote their time to those few where injustice may have been done.”<sup>14</sup>

Judge Wood proposes something quite different from what Judge Friendly had in mind. Judge Wood suggests that freestanding claims of innocence be *added* to the many existing grounds for collateral relief.<sup>15</sup> Judge Friendly proposed, in contrast, eliminating many existing grounds for collateral relief unless the prisoner could “supplement[ ]” his constitutional claim with a colorable claim of innocence.<sup>16</sup> In short, Judge Wood has turned Judge Friendly’s proposal on its head.

Judge Wood suggests that it is “unclear” whether Judge Friendly endorsed a freestanding claim of innocence in collateral review as opposed to only a “gateway” claim of innocence.<sup>17</sup> But Judge Friendly could not have been clearer that he viewed innocence only as a necessary prerequisite to habeas relief, not as a basis for relief in its own right. He insisted that a prisoner “supplement[ ]” his constitutional claim with a showing of innocence, making clear that both elements were required.<sup>18</sup> He proposed granting relief only for “the kind of *constitutional claim* that casts some shadow of a doubt” on the defendant’s guilt.<sup>19</sup> And he explained that there was “no sufficient reason for federal intervention on behalf of a state prisoner who raised or had an opportunity to raise his *constitutional claim* in the state courts, in the absence of a colorable showing of innocence.”<sup>20</sup> Apart from a small class of grievous constitutional violations, Judge Friendly would have required proof of both a violation of federal law in securing a prisoner’s conviction *and* actual innocence as prerequisites for habeas relief.

Judge Friendly’s article asked whether innocence was irrelevant, not whether constitutional error was irrelevant.<sup>21</sup> Indeed, Judge Friendly’s goal of “halting the inundation” of federal-habeas petitions makes sense only if we understand his proposal for proof of innocence as serving a gatekeeping function.<sup>22</sup> As Judge Wood acknowledges, creating a freestanding claim of innocence would increase the risk “that hordes of prisoners would raise frivolous claims of innocence, and that the courts would drown” in the flood of petitions—the very problem Judge Friendly sought to remedy.<sup>23</sup>

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14 *Id.* at 150.

15 Wood, *supra* note 2, at 1832.

16 Friendly, *supra* note 1, at 142.

17 Wood, *supra* note 2, at 1834.

18 Friendly, *supra* note 1, at 142.

19 *Id.* (emphasis added) (quoting *Kaufman v. United States*, 394 U.S. 217, 242 (1969) (Black, J., dissenting)).

20 *Id.* at 167 (emphasis added).

21 *Id.* at 172.

22 *Id.* at 157.

23 Wood, *supra* note 2, at 1832.

## II

Judge Wood's proposal is also in deep tension with the limited jurisdiction of federal courts. Although her core premise is that actual innocence "[s]urely . . . should stand at the top of the hierarchy of reasons for granting relief, even at such a late stage as a collateral petition,"<sup>24</sup> she never explains how federal courts possess that authority. As courts of limited jurisdiction, federal courts possess only the power that arises from the Constitution and federal statute.<sup>25</sup> And neither the Constitution nor federal law empowers the federal courts with the right to grant writs of habeas corpus on the basis of innocence alone.

Support for a right to habeas relief because of actual innocence cannot be found in the Constitution itself. Although the Constitution secures a right to habeas corpus through the Suspension Clause,<sup>26</sup> Judge Friendly explained that "the writ protected by the suspension clause is the writ as known to the framers."<sup>27</sup> And as he explained, a "fundamental principle[ ]" of habeas corpus at the founding was that "once a person had been convicted by a superior court of general jurisdiction, a court seized of a habeas petition could not go behind the conviction for any purpose other than to verify the jurisdiction of the convicting court."<sup>28</sup> In other words, the "general rule" was that "a conviction and sentence by a court of competent jurisdiction is lawful cause of imprisonment, and no relief can be given by *habeas corpus*."<sup>29</sup> Unsurprisingly, then, the writ provided in the Judiciary Act of 1789 did not benefit "persons Convict or in Execution."<sup>30</sup> It cannot be said that imprisoning a factually innocent person after a full and fair trial violates the Constitution when the Suspension Clause was originally understood to not afford habeas relief to prisoners convicted by a lawful process in a court with competent jurisdiction.

Nor can the authority for a freestanding claim of innocence be found in any federal statute. Although Congress has long empowered federal courts to grant habeas relief after a state court has convicted a prisoner, federal law allows relief only on "the ground that [a petitioner] is in custody in violation of the Constitution or laws or treaties of the United States."<sup>31</sup> So imprison-

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24 *Id.*

25 *See, e.g.,* *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *see also* *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 11 (1799) ("A Circuit Court, however, is of limited jurisdiction; and has cognizance, not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases, which an unlimited jurisdiction would embrace.").

26 *See* U.S. CONST. art. I, § 9, cl. 2; *see also* *INS v. St. Cyr*, 533 U.S. 289, 300–01 (2001).

27 Friendly, *supra* note 1, at 170.

28 *Id.* at 171 n.147.

29 *Ex parte Siebold*, 100 U.S. 371, 375 (1880).

30 *Habeas Corpus Act* 1679, 31 Car. 2 c. 2 (Eng.); *see* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82; *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 101 (1869) ("As limited by the act of 1789, [the writ] did not extend to cases of imprisonment after conviction, under sentences of competent tribunals . . .").

31 28 U.S.C. § 2254(a) (2018).

ing an innocent person after a full and fair trial would justify habeas relief only if the judgment of conviction and sentence violated federal law.<sup>32</sup>

Although Judge Wood describes “convicting one who is actually innocent” as a “foundational error,”<sup>33</sup> she admits that the Supreme Court has not so ruled. As she acknowledges,<sup>34</sup> the Supreme Court has only “assume[d], for the sake of argument,” that *executing* an innocent defendant after a full and fair trial would be unconstitutional.<sup>35</sup> But this assumption is a shaky foundation on which to rest a broader federal right. Not only has the Supreme Court never held that *executing* an innocent person violates the Constitution, it has never even suggested that *imprisoning* an innocent person after a full and fair trial would do so. Indeed, for over a century, the Supreme Court has distinguished a petitioner’s guilt or innocence from whether a constitutional violation led to his punishment.<sup>36</sup>

Perhaps recognizing the dearth of support for actual-innocence challenges to imprisonment, Judge Wood suggests that Congress could “tweak” existing law to allow for her proposal.<sup>37</sup> But she skips over another necessary premise to her position: that Congress enjoys the power to do so. Needless to say, creating a new federal claim for habeas relief based on innocence alone would be controversial.<sup>38</sup> Congress, of course, cannot create new constitutional rights where none exist.<sup>39</sup> And Judge Wood does not otherwise

32 See NANCY J. KING & JOSEPH L. HOFFMANN, *HABEAS FOR THE TWENTY-FIRST CENTURY* 97 (2011) (“[T]he habeas remedy does not create the federal rights it vindicates. The federal guarantees upon which habeas petitioners must rely to challenge their state convictions and obtain relief from the federal courts must be established independently by Supreme Court decisions interpreting and applying the Constitution.”).

33 Wood, *supra* note 2, at 1823.

34 *Id.* at 1830.

35 *Herrera v. Collins*, 506 U.S. 390, 417 (1993); see also *In re Davis*, 557 U.S. 952, 955 (2009) (Scalia, J., dissenting); *House v. Bell*, 547 U.S. 518, 554–55 (2006).

36 See, e.g., *Herrera*, 506 U.S. at 400 (“[F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.”); *Townsend v. Sain*, 372 U.S. 293, 317 (1963) (“[T]he existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.”); *Moore v. Dempsey*, 261 U.S. 86, 87–88 (1923) (“[W]hat we have to deal with [on habeas review] is not the petitioners’ innocence or guilt but solely the question whether their constitutional rights have been preserved.”); *Ex parte Terry*, 128 U.S. 289, 305 (1888) (“As the writ of *habeas corpus* does not perform the office of a writ of error or an appeal, [the facts establishing guilt] cannot be re-examined or reviewed in this collateral proceeding.”).

37 Wood, *supra* note 2, at 1833.

38 See KING & HOFFMANN, *supra* note 32, at 97 (“[G]iven the limited constitutional authority provided to Congress in the area of criminal justice, it is doubtful that any federal habeas statute could manufacture a new federal right, cognizable in habeas, on behalf of state prisoners who claim to be factually innocent.”); cf. *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (“The States possess primary authority for defining and enforcing the criminal law. . . . Federal intrusions into state criminal trials frustrate both the States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.” (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982))).

39 See *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997).

explain how Congress, through its enumerated powers, has the authority to legislate on this subject.

### III

Judge Wood makes a bold proposal: that federal courts or Congress should depart from years of practice and precedent to provide state prisoners whose convictions were obtained by fair processes another opportunity to establish their innocence in federal courts. But she neither explains how this new claim would work in practice nor makes the case that this new claim would provide relief to a substantial number of prisoners. Of course, Judge Wood's proposal has normative appeal: no one wants to see an innocent person convicted. Fortunately, existing processes already guard against that result, and Judge Wood does little to explain why more guards are necessary.

Judge Wood does not address the single most important aspect of an actual-innocence claim—the remedy. What remedy should be afforded to a state prisoner with a successful claim of actual innocence? Several Justices posed that question in *Herrera*,<sup>40</sup> but Judge Wood provides no answer. Her answer likely depends on which standard courts adopt to evaluate these claims, another question about which she avoids expressing an opinion.<sup>41</sup> But these questions must be answered before Judge Wood's solution can be accepted.

Judge Wood also fails to make a persuasive case that a substantial number of state prisoners would even benefit from being allowed to raise a claim of actual innocence. In short, she offers no proof that providing state prisoners a habeas remedy for actual innocence would solve a real problem. To be sure, Judge Wood references 2471 “exonerations” since 1989, the low presidential-pardon rate, and the short statute of limitations to bring a federal-habeas claim.<sup>42</sup> But none of those facts support the need for a freestanding claim of actual innocence.

Take the 2471 “exonerations.” Not all of these so-called “exonerations” involve “actual innocence.”<sup>43</sup> Although I did not explore all of these cases, a quick review reveals some convictions that were vacated because a court ruled that the prisoner had ineffective assistance of counsel. That is, the court did not pass on the guilt or innocence of the prisoner but concluded only that

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40 See *Herrera*, 506 U.S. at 403 (“The dissent fails to articulate the relief that would be available if petitioner were to meet[ ] its ‘probable innocence’ standard. Would it be commutation of petitioner’s death sentence, new trial, or unconditional release from imprisonment?”).

41 Wood, *supra* note 2, at 1832–33 (identifying three possible standards for evaluating claims of actual innocence).

42 *Id.* at 1820, 1827–28.

43 Judge Wood cites to the New England Innocence Project for this statistic, *see id.* at 1820, which in turn relies on the National Registry of Exonerations, *see Causes of Wrongful Convictions*, NEW ENGLAND INNOCENCE PROJECT, <http://www.newenglandinnocence.org/causes-of-wrongful-convictions> (last visited Mar. 18, 2020). So, I reviewed that registry.

the prisoner's counsel was deficient in some respect—a classic problem of fair process.

For example, one alleged exoneration involved a defendant accused of “molesting one of his female students more than [sixty] times.”<sup>44</sup> The girl testified at his first trial that the defendant “fondled her at virtually all of her lessons.”<sup>45</sup> After trial, the defendant obtained new counsel who argued that his trial counsel failed to present an adequate defense by not offering character witnesses or securing a psychological evaluation.<sup>46</sup> The state court granted a new trial for those reasons.<sup>47</sup> The district attorney then dismissed the charge only because the victim refused to testify again.<sup>48</sup> Indeed, the defense attorney admitted that the dismissal did not establish his client's innocence.<sup>49</sup>

In another contested case, a defendant was convicted of raping an eight-year-old girl.<sup>50</sup> Over twenty years later, the girl recanted, but medical evidence and other witnesses contradicted her recantation.<sup>51</sup> Although the state chose not to retry him after a new trial was ordered, a judge denied him state compensation because he had not satisfied his “burden of proving actual innocence.”<sup>52</sup>

Another of the alleged “exonerations” illustrates the difficulty of evaluating the evidence decades later. A federal district court granted the writ to a state prisoner after finding that the prisoner carried his burden to overcome procedural default by establishing actual innocence and his burden to prove a constitutional error by establishing a *Brady*<sup>53</sup> violation.<sup>54</sup> The Fifth Circuit affirmed the grant of relief over a sharp dissent.<sup>55</sup> And the state, adamantly maintaining its belief in the defendant's guilt, then dropped the charges only because “of missing witnesses and the loss of crucial evidence.”<sup>56</sup> The district

44 Maurice Possley, *Boping Chen*, NAT'L REGISTRY EXONERATIONS (Sept. 7, 2012), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3991>.

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 See Dave Boyce, *Piano Teacher Walks After Judge Dismisses Retrial*, ALMANAC (Nov. 2, 2009), <https://www.almanacnews.com/news/2009/11/02/piano-teacher-walks-after-judge-dismisses-retrial>.

50 Maurice Possley, *Andrew Taylor*, NAT'L REGISTRY EXONERATIONS (Feb. 2, 2017), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5080>.

51 *Id.*

52 *Id.*

53 *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

54 See *Floyd v. Vannoy*, 894 F.3d 143, 148 (5th Cir. 2018) (per curiam); Ken Otterbourg, *John Floyd*, NAT'L REGISTRY EXONERATIONS (Dec. 3, 2018), <http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=5454>.

55 See *Floyd*, 894 F.3d at 168–73 (Smith, J., dissenting).

56 Matt Sledge, *John Floyd, Once a Lifer at Angola, to Have Murder Case Dropped, Orleans DA Says*, NEW ORLEANS ADVOC. (Nov. 20, 2018), [https://www.nola.com/article\\_8322f022-4ccb-5323-bc61-045d5b57b000.html](https://www.nola.com/article_8322f022-4ccb-5323-bc61-045d5b57b000.html); see also *In re Allen*, 366 S.W.3d 696, 708 (Tex. 2012) (observing that the prosecutor only dismissed the charges because of “the destruction . . .

attorney expressed frustration that a federal court “ha[d] replaced the finding of the experienced [state] judge who was the finder of fact when the evidence was freshest, and who was in the courtroom 35 years ago to personally evaluate the credibility of the defendant’s concocted alibi.”<sup>57</sup>

My quick review of the data on which Judge Wood relies also uncovered that many of the “exonerated” prisoners received relief from *state* courts, not federal courts. Again, I did not review all 2471 cases, but from my experience you could blindly throw a dart at this list and odds are you would hit a state prisoner whose conviction was vacated through state processes.<sup>58</sup> My experience is unsurprising when you take into account that less than one percent of all noncapital federal-habeas petitions filed by state prisoners are granted each year.<sup>59</sup> That so many “exonerated” state prisoners receive relief from state courts suggests that state courts are already doing a fine job at ferreting

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of all physical evidence, the death of one fact witness, the failing memory of another fact witness, and the effect of the passage of time . . . on the memory of other fact witnesses and the health of yet other surviving witnesses”); Maurice Possley, *Billy Frederick Allen*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3884> (last updated June 27, 2016).

57 Heather Nolan, *Orleans DA Moves to Vacate 1982 Murder Conviction, Dismiss Case Against John Floyd*, TIMES-PICAYUNE (Nov. 20, 2018), [https://www.nola.com/news/crime\\_police/article\\_dcee04d8-6614-5f1e-8e23-47e11034d222.html](https://www.nola.com/news/crime_police/article_dcee04d8-6614-5f1e-8e23-47e11034d222.html); see also *Herrera v. Collins*, 506 U.S. 390, 391 (1993) (“[T]he passage of time only diminishes the reliability of criminal adjudications.”); *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) (“[W]hen a habeas petitioner succeeds in obtaining a new trial, the ‘erosion of memory’ and ‘dispersion of witnesses’ that occur with the passage of time’ . . . diminish the chances of a reliable criminal adjudication.” (quoting *Kuhlman v. Wilson*, 477 U.S. 436, 453 (1986))); Friendly, *supra* note 1, at 147 (“The longer the delay, the less the reliability of the determination of any factual issue giving rise to the attack. . . . Moreover, although successful attack usually entitles the prisoner only to a retrial, a long delay makes this a matter of theory only.”).

58 See, e.g., Ctr. on Wrongful Convictions, *Corey Eason*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3197> (last visited Mar. 7, 2020) (Illinois county court vacated conviction); Possley, *supra* note 56 (Texas state court vacated conviction and ordered new trial); Maurice Possley, *Craig Armstrong*, NAT’L REGISTRY EXONERATIONS (Sept. 22, 2019), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5612> (Illinois Appellate Court vacated conviction); Maurice Possley, *Darrell Wayne Bivens, Jr.*, NAT’L REGISTRY EXONERATIONS (Apr. 15, 2013), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4146> (Texas District Attorney’s office requested that the state court vacate conviction because it concluded, only one month after Bivens pled guilty, that a mistake had been made); Maurice Possley, *Dennis Davis*, NAT’L REGISTRY EXONERATIONS (June 19, 2019), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5585> (Texas state courts vacated conviction); Maurice Possley, *Margaret Earle*, NAT’L REGISTRY EXONERATIONS (Feb. 23, 2014), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4381> (Massachusetts Supreme Judicial Court vacated conviction); Maurice Possley, *Wilbert Jones*, Nat’l Registry Exonerations (Oct. 13, 2018), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5392> (Louisiana state courts vacated conviction).

59 KING & HOFFMAN, *supra* note 32, at 79, 81 (estimating that “fewer than sixty of the more than seventeen thousand habeas cases filed each year in the federal courts will result in the order of a retrial, resentencing, new opportunity for appeal, or release”).

out those “actually innocent” prisoners. This general statistic does little to support an argument that the existing processes for evaluating claims of actual innocence are insufficient.

Judge Wood also cites the “grim” statistics on presidential clemency as evidence that clemency provides an insufficient avenue of relief for innocent state prisoners.<sup>60</sup> But the President can grant clemency only to federal prisoners.<sup>61</sup> The President has no power to pardon state prisoners.<sup>62</sup> So the “grim” presidential pardon statistics are of no concern to federal collateral review of state convictions.<sup>63</sup>

Fortunately, the statistics for state clemency are not as “grim.” For example, sixteen states “frequent[ly] and “regular[ly]” grant pardons, which means these states have “a regular pardon process with a high percentage of applications granted (30% or more).”<sup>64</sup> Indeed, Alabama and Georgia ordinarily grant more than 500 pardons annually.<sup>65</sup> Connecticut too grants over 500 pardons annually.<sup>66</sup> And three of the top five states with prisoners currently sentenced to death are among the sixteen states that “frequently and regularly” grant pardons.<sup>67</sup> That many states have a robust clemency program undermines the need for the creation of a freestanding federal claim of innocence.<sup>68</sup>

In addition to clemency, many states also afford other protections to guard against the continued imprisonment of innocent prisoners. For example, all states have enacted statutes that allow postconviction DNA testing in

60 Wood, *supra* note 2, at 1828.

61 See U.S. CONST. art. II, § 2 (“The President . . . shall have Power to grant Reprieves and Pardons for Offenses *against the United States* . . .” (emphasis added)).

62 See *id.*

63 See *Herrera v. Collins*, 506 U.S. 390, 414–16 (1993) (explaining that states have long made clemency available to its prisoners and observing that clemency has played a significant role in securing the release of factually innocent persons).

64 Margaret Colgate Love, *50-State Comparison: Pardon Policy & Practice*, COLLATERAL CONSEQUENCES RESOURCES CTR., <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/> (last updated Mar. 2020).

65 *Id.*

66 *Board of Pardons and Parole Statistical Information*, ST. CONN. BOARD PARDONS & PAROLES, <https://portal.ct.gov/BOPP/Research-and-Development-Division/Statistics/Statistics> (last visited Apr. 5, 2020).

67 TRACY L. SNELL, U.S. DEP’T OF JUSTICE, CAPITAL PUNISHMENT, 2017: SELECTED FINDINGS 2 (2019), <https://www.bjs.gov/content/pub/pdf/cp17sf.pdf> (identifying California, Florida, Texas, Alabama, and Pennsylvania as the top five states with prisoners under death sentences); Love, *supra* note 64 (classifying Alabama, California, and Pennsylvania as frequent and regular); see also *Ex parte Elizondo*, 947 S.W.2d 202, 204–05 (Tex. Crim. App. 1996) (en banc) (confirming that state prisoners can raise freestanding claims of actual innocence “as an independent ground for relief” in postconviction proceedings).

68 See *Herrera*, 506 U.S. at 415 (“Executive clemency has provided the ‘fail safe’ in our criminal justice system.” (quoting KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 131 (1989))).

certain circumstances.<sup>69</sup> “[A]ll states have enacted statutes which allow for motions for new trials based on newly discovered evidence,” and some allow for newly discovered evidence to “serve as grounds for post-conviction relief.”<sup>70</sup> Some states have even begun allowing prisoners to raise freestanding claims of actual innocence on collateral review.<sup>71</sup> These additional safeguards again suggest that few, if any, state prisoners would even benefit from the creation of a new federal claim of innocence.<sup>72</sup>

Finally, Judge Wood’s concern that evidence of a state prisoner’s actual innocence may not be easily obtainable and can “take [ ] much longer than the one-year period given by the statute” does not support the need for a freestanding claim of innocence.<sup>73</sup> The Supreme Court and Congress have already addressed this issue. As Judge Wood acknowledges,<sup>74</sup> the Supreme Court allows a petitioner to overcome the limitations bar so long as he proves that he “pursu[ed] his rights diligently” and that “some extraordinary circumstance” prevented timely filing.<sup>75</sup> “[A] credible showing of actual innocence” also suffices to overcome the limitations bar.<sup>76</sup> Similarly, the Antiterrorism and Effective Death Penalty Act permits the filing of a second or successive petition where “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence” and those facts “establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty.”<sup>77</sup> Judge Wood does not explain why these mechanisms are insufficient to protect a prisoner who belatedly uncovers new evidence.

69 See John M. Leventhal, *A Survey of Federal and State Courts’ Approaches to a Constitutional Right of Actual Innocence: Is There a Need for a State Constitutional Right in New York in the Aftermath of CPL § 440.10(G-1)?*, 76 ALB. L. REV. 1453, 1474–77 (2013).

70 *Id.* at 1472–74.

71 *Id.* at 1477–81.

72 See KING & HOFFMAN, *supra* note 32, at 88–89 (observing that since the rapid expansion of federal habeas relief for state prisoners in the 1960s, “states have adopted and implemented modern appellate and postconviction remedies” that are “available and routinely used to review federal constitutional claims [and that] . . . [the] particular crisis in the balance of power between federal law and state governments no longer exists”); *id.* at 86 (“The institutional and structural reforms of state judicial review have long since occurred, and convicted defendants generally now have access to state appellate and postconviction review processes . . . [so] habeas litigation in state noncapital cases today . . . is an appalling waste of resources . . .”); see also William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 441 (1961) (explaining that federal habeas review of state court convictions “would become unnecessary” once states implemented appellate and postconviction procedures that redressed constitutional violations).

73 Wood, *supra* note 2, at 1827.

74 *Id.* at 1828–29.

75 *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

76 *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013).

77 Antiterrorism and Effective Death Penalty Act of 1996, § 106(b), 28 U.S.C. § 2244(b)(2)(B) (2018).

Judge Wood proposes that the federal courts and Congress deviate from the original purpose of the Great Writ and many years of practice. Before adopting such a significant change, we should expect there to be evidence of a significant problem. But Judge Wood offers no such evidence. If anything, Judge Friendly's case for restricting collateral review for convicted prisoners remains compelling but unfulfilled.

Judge Friendly suggested that the "proverbial man from Mars" would be shocked to learn that "the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime."<sup>78</sup> And Judge Wood offers no evidence that claims of innocence in collateral review are increasing. If the 7500 applications for postconviction relief filed the year before Judge Friendly wrote his article were beyond an "inundation," "what is the right word for" the more than 22,000 applications filed last year?<sup>79</sup> Like most federal-habeas petitions filed by state prisoners, Judge Wood's proposal should be denied.

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78 Friendly, *supra* note 1, at 145.

79 *Id.* at 144; Table C-2—U.S. District Courts—Civil Federal Judicial Caseload Statistics, U.S. COURTS (Mar. 31, 2019), <https://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2019/03/31>.

